

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

**DCM PART 3**

**DECISION**

**HON. JOSEPH J. MALTESE**

**ALEYDIS LLOVET,**

*Plaintiff,*

*-against-*

**Index No. 102519/05**

**Calendar Nos. 3751-004**

**188-005**

**MARGARET ULTRA HOME CARE INC., VISITING  
NURSE ASSOCIATION OF STATEN ISLAND and  
HATTIE MOORE,**

*Defendants.*

**x**

The following papers numbered 1 to 5 were submitted on these motions the 29<sup>th</sup> day of May, 2009:

Pages

Numbered

Notice of Motion for Summary Judgment by  
Defendant Visiting Nurse Association of  
Staten Island, with Supporting Papers and Exhibits  
(dated November 26, 2008).....1

Amended Notice of Cross Motion for Partial Summary Judgment  
and Affirmation in Opposition by Defendant Margaret  
Ultra Home Care and Hattie Moore, with Supporting Papers  
(dated January 13, 2009).....2

Affirmation in Reply, with Exhibit  
(undated).....3

Affirmation in Opposition to Cross Motion  
by Plaintiff Aleydis Llovet, with Exhibits  
(dated May 4, 2009).....4

Affirmation in Reply by Defendant Hattie Moore  
and Margaret Ultra Home Care, Inc., with Exhibits  
(dated May 28, 2009).....5

Upon the foregoing papers, the motions are decided as indicated herein.

Defendant Visiting Nurse Association of Staten Island (hereafter, VNA) moves by notice of

motion for an order granting it summary judgment on its cross claims as against co-defendants Margaret Ultra Home Care Inc. (hereafter, Margaret Ultra) and Hattie Moore for contribution as well as indemnification, both contractual and at common-law<sup>1</sup>. Co-defendants Margaret Ultra and Hattie Moore partially oppose such application, and cross-move for an order dismissing plaintiff's cause of action for punitive damages. Plaintiff Aleydis Llovet opposes the cross motion.

This litigation arises from allegations of negligent home care administered to plaintiff, a quadriplegic, on June 19, 2005 by defendant Hattie Moore which resulted in burns to plaintiff's right hand. Ms. Moore was a home care attendant employed by defendant Margaret Ultra. On or about March 21, 2005, VNA and Margaret Ultra entered into a written agreement to facilitate the delivery of comprehensive in-patient home care. As agreed, VNA was to develop a patients' plan of care, and Margaret Ultra was to provide home care attendants to, *e.g.*, assist patients with their personal hygiene.

Plaintiff commenced this action by the filing and service of a summons with complaint upon the defendants on or about August 24, 2005. Issue was joined by the service of an answer asserting cross claims by VNA as against its co-defendants, Margaret Ultra and "Jane Doe" (Hattie Moore) on or about October 6, 2005, while its co-defendants answered on or about October 4, 2005. On or about November 2, 2007, plaintiff filed and served an amended complaint naming Hattie Moore in the place of "Jane Doe", and amended answers were interposed by VNA on or about December 14, 2007, and Margaret Ultra and Hattie Moore on or about May 22, 2008. In its amended answer, VNA again cross-claimed against Margaret Ultra and Hattie Moore for contribution, common-law

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<sup>1</sup>Prior to the return date of the instant motion, defendant VNA withdrew that part of its application which sought dismissal of the complaint as against it.

indemnification and contractual indemnification. On October 7, 2008, a note of issue was filed.

In support of its motion for partial summary judgment on its cross claims, defendant VNA relies upon the pleadings, an attorneys' affirmation, the deposition testimony of plaintiff, Hattie Moore, Margaret Ukatu (the owner of Margaret Ultra), Lois Moses (the vice president of quality control for VNA), and a copy of the contract between VNA and Margaret Ultra. Based upon these submissions, VNA alleges that (1) it did not assume, directly or indirectly, any responsibility to supervise any employee of Margaret Ultra; (2) Margaret Ultra was charged with the duty of training its aides to comply with the applicable law and (3) Margaret Ultra agreed to indemnify, defend and hold harmless VNA for all actions, omissions and failures of its aides in the performance of their duties. Relying upon the above and the clear contract language, VNA alleges it is entitled to the relief requested in its cross claims.

In opposition, the co-defendants allege in an attorneys' affirmation, that (1) the request for indemnification is void as untimely, (2) the relied upon contractual language violates General Obligations Law §5-321, and (3) the relied upon contractual language is further void because it fails to require insurance coverage to offset any risk of loss. Thus, it is argued that VNA's motion for partial summary judgment should be denied.

In the opinion of this Court, VNA has demonstrated its *prima facie* entitlement to summary judgment on its request for indemnification, and that its co-defendants have failed to raise a triable issue of fact in response thereto (Alvarez v. Prospect Hosp., 68 NY2d 320). VNA's application for indemnification is clearly timely. Moreover, their contract is not violative of General Obligations Law §5-321 nor is there any requirement, contractual or otherwise, that an indemnitor take out insurance to cover any of its potential losses.

The cross claim, *e.g.*, for indemnification can hardly be considered untimely, since there has been no finding as yet regarding the negligence of any party. In fact, it is technically premature. In addition, the co-defendants' reliance upon General Obligations Law §5-321 is misplaced, as that section refers to attempts by a lessor to escape liability for its own acts of negligence. Assuming that it was otherwise applicable (*see also* General Obligations Law §§5-322, 5-323, 5-325, 5-326), on the record before this Court there is no evidence that VNA was either a lessor or actively negligent (*see* Gross v. Sweet, 49 NY2d 102). Finally, it is well settled that even where permissible, a contract containing a freely negotiated indemnification provision is valid unless it purports to grant indemnity to a party for damages caused by that same party's willful or negligent acts (Austro v. Niagara Mohawk Power Corp., 66 NY2d 674, 676; Gross v. Sweet, 49 NY2d at 106). Thus, there is no prohibition to VNA's obtaining indemnification if it is held vicariously liable for the negligent acts of either Margaret Ultra and/or Hattie Moore.

As to VNA's right to a conditional judgment, it is well established that "[a] court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitees may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided that there are no issues of fact concerning the indemnitees active negligence" (George v. Marshall's of MA, Inc., \_\_AD3d\_\_, 878 NYS2d 164, 165 *citing* Gil v. Manufacturers Hanover Trust Co., 39 AD3d 703, 705; State of New York v. Travelers Prop. Cas. Ins. Co., 280 AD2d 756, 757-758; *see also* Lowe v. Dollar Tree Stores, Inc., 40 AD3d 264, 265, *lv dismissed* 9 NY3d 891). Here, however, VNA has voluntarily chosen to withdraw that branch of its motion which sought dismissal of the complaint as against it, thereby leaving it vulnerable to plaintiff's claim that it was actively negligent "in the hiring, supervision, training and control " of the

other defendants. In light of the above, this Court cannot dismiss this claim of active negligence as a matter of law, and conditional judgment of indemnification is plainly unwarranted. Next, the Court will consider plaintiff's cross motion.

In this State, there is no separate cause of action for punitive damages (Weir Metro Ambu-Service v. Turner, 57 NY2d 911, 912). Thus, plaintiff's third cause of action seeking punitive damages must be dismissed.

Accordingly, it is

**ORDERED** that the motion for partial summary judgment by defendant Visiting Nurse Association of Staten Island is denied; and it is further

**ORDERED** that the cross motion by defendants Margaret Ultra Home Care Inc. and Hattie Moore to dismiss plaintiff's third cause of action sounding in punitive damages is granted; and it is further

**ORDERED** that said third said cause of action is severed and dismissed; and it is further

**ORDERED** that the Clerk of the Court enter judgment accordingly.

All parties shall appear for a status conference in DCM Part 3 on **August 6, 2009** at 9:30 a.m.

ENTER,

DATED: July 20, 2009

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Joseph J. Maltese  
Justice of the Supreme Court